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Notes

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by
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Hypocrisy is easier to attack than evil.

—Unknown

Introduction

The United States government is adamantly opposed to the 1998 Rome Statute for the International Criminal Court ("ICC"), a treaty that is expected to create an international court empowered to prosecute individuals accused of genocide, crimes against humanity and war crimes by the end of 2002.[1] In fact, the U.S. House of Representatives passed the American Service Members Protection Act ("ASPA") in May 2001.[2] In accordance with Bush Administration policy, the sole purpose of ASPA was to undermine

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1. *See generally* H.R. 1794, 107th Cong. (1st Sess. 2001); S. 1610, 107th Cong. (1st Sess. 2001); Press Release, Human Rights Watch, "Scare Tactics" on International Court Denounced, *at* http://www.hrw.org/press/2000/06/icc-0614.htm (last visited Jan. 3, 2001) [hereinafter "Scare Tactics"]; Press Release, Human Rights Watch, Congress Backs Away From Passing Strong Anti-ICC Legislation, Remaining Language Reveals Softer Yet Continued U.S. Opposition to the ICC, *at* http://www.igc.org/icc/html/Hyde Amendment.html (last visited Jan. 21, 2002) [hereinafter Anti-ICC].

2. *See generally* H.R. 1794; S. 1610; "Scare Tactics," *supra* note 1; Anti-ICC, *supra* note 1.

international cooperation with the ICC, and on December 7, 2001, the Senate passed a more strident version of ASPA by a vote of 78-21.[3]

Taken together, the bills serve several anti-ICC functions. For instance, by prohibiting any U.S. cooperation with the ICC, ASPA versions I and II require immunity from the ICC before U.S. troops are allowed to be involved in UN peacekeeping missions, limit foreign aid to allies unless they sign accords preventing U.S. troops within their borders from being delivered to the ICC, and grant the President the power to use "all means necessary and appropriate" to free any American detained by the ICC.[4]

While Jesse Helms submitted the Senate version of ASPA as an amendment to the Defense Appropriations Bill, the House and Senate agreed in conference committee on December 20, 2001 to accept the House's Hyde Amendment. The House version is a weaker, yet prohibitive piece of legislation intended to undermine U.S. cooperation with the ICC by barring the use of Defense Department funds for any related activities. The Hyde Amendment does not contain waivers and will expire at the end of the 2002 fiscal year, but continued opposition to the ICC is expected.[5]

By opposing the ICC, the U.S. has broken ranks with all of its allies, except for Israel.[6] Even more surprising is the fact that U.S. opposition has placed it on the same ground as China and countries the U.S. has referred to as "rogue" states, such as Iraq and Libya.[7] In October 2001, German Foreign Minister Joschka Fischer warned U.S. Secretary of State Colin Powell that "the ASPA would open a rift between the U.S. and the European Union on this important issue."[8]

As reflected by both versions of the ASPA and statements made by U.S. officials, the U.S. government's position is that the ICC

3. *See generally* H.R. 1794; S. 1610; Press Release, The International Herald Tribune, Bush Administration Wants War Crimes Court Curtailed *at* http://www.iht.com/cgi-bin/generic.cgi?template=articleprint.tmplh&ArticleId=49794 (visited March 2, 2002) [herinafter Bush Administration]; "Scare Tactics," *supra* note 1; Anti-ICC, *supra* note 1.

4. *See generally* H.R. 1794; S. 1610; "Scare Tactics," *supra* note 1; Anti-ICC, *supra* note 1.

5. *See generally* H.R. 1794; S. 1610; "Scare Tactics," *supra* note 1; Anti-ICC, *supra* note 1.

6. Geopolitics – International Criminal Court *at* http://www.globalissues.com/Geopolitics/ICC.asp (last visited Jan. 2, 2001) [hereinafter Geopolitics].

7. *Id.*

8. *See* Press Release, Human Rights Watch, U.S.: Waiver Needed for War Crimes Court: Senate Legislation a "New Low for Human Rights," *at* http://www.hrw.org/press/2001/12/ASPA1210.htm (last visited Jan. 21, 2002).

Treaty is flawed because it is legally and politically illegitimate.[9] However, the ICC Treaty is not flawed. In actuality, it is the ad hoc international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), forums the U.S. strongly supports, that can validly be seen as legally and politically illegitimate.[10] That is, many of the U.S. government's criticisms of the legal and political structure of the ICC can be more appropriately and effectively leveled at the ICTY. This Note argues that it is not the ICC treaty, but rather U.S. foreign policy towards the international criminal tribunals that is flawed.

Part I discusses the past efforts to create international criminal courts that led to the creation of the ICTY and the imminent development of the ICC. Part II juxtaposes the advantages and disadvantages of the ICTY being created by the Security Council with the treaty approach taken by the ICC. In Part III, the legal legitimacy of the Security Council constructing the ICTY will be criticized, while legality of the ICC will be defended in relation to third party states and the U.S. Constitution. Part IV will show how the ICTY is politically illegitimate because it encumbers sovereignty and is politically dependent upon the Security Council. Conversely, the discussion will focus on how the ICC pays deference to sovereignty, and in addition to being truly independent, is controlled by the Security Council only enough to prevent politically motivated attacks. Finally, this Note will conclude that the U.S. must reformulate its foreign policy to support instead of impede the ICC. To criticize the ICC and support the ICTY, a tribunal to which those criticisms more

9. *See* H.R. 1794; S. 1610; Press Release, Helms Statement Offering American Service Members' Protection Act As Amendment to the Defense Appropriations Bill *at* http://www.senate.gove/~foreign/minority/press_template.cfm?rands_id= 179880 (last visited Jan. 21, 2002).

10. *See* H.R. 1794; S. 1610. I am using the ICTY and not the very similar International Criminal Tribunal for Rwanda ("ICTR") for comparison with the ICC, because the Security Council created the ICTY without being requested by the countries involved or the General Assembly, and therefore, it better illustrates the wide gap between the U.S. view of a legally and politically legitimate international criminal tribunal and an international criminal tribunal with significant legal and political legitimacy. While the Bush Administration has recently criticized the integrity, efficiency, and cost of the processes of the ad hoc tribunals and requested that they conclude by 2007-2008 to the chagrin of U.S. allies and Democrats in Congress, the Bush Administration has not withdrawn its support of the tribunals and has not ruled out the use of ad hoc international criminal tribunals in the future. *See generally* Press Release, MSNBC News Services, U.S. Building War Crimes Case Against Saddam *at* http://www.msnbc.com/news/716935.asp (visited March 1, 2002); Bush Administration, *supra* note 3.

fairly apply, is hypocrisy. The U.S. must not let its power cloud its judgment.

I. History

At the end of World War I, momentum for a permanent international criminal court slowly began to build.[11] The Treaty of Versailles called for the establishment of an international criminal tribunal to try the German Emperor, Kaiser Wilhelm, for "a supreme offense against morality and the sanctity of treaties," but he never actually stood trial.[12] More importantly, a treaty providing for an international criminal tribunal to try Turkish leaders accused of slaughtering millions of Armenians was never ratified, and the alleged perpetrators were granted amnesty.[13]

However, the Nuremberg and Tokyo Tribunals set up after World War II were much more effective.[14] These tribunals were temporary and did not try many people, but they set important precedents.[15] The Charter of the Nuremberg Tribunal, adopted in August 1945, clarified what crimes were to be prosecuted under international law: crimes against peace, war crimes, and crimes against humanity.[16] The Nuremberg Tribunal reflected the international community's support for holding individual offenders, regardless of political status, responsible for acts that have become unacceptable to common views of international law and morality.[17] The Nuremberg and Tokyo Tribunals also discarded the defense of state sovereignty for such horrific acts, and established principles of accountability that were later enumerated in the 1950 U.N. Declaration of Principles of the Nuremberg Charter and Judgment.[18]

11. Jelena Pejic, *Creating A Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 294 (1998) (citing Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 43).

12. *Id.*

13. *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 17 (1997).

14. Pejic, *supra* note 11 at 295-96.

15. *Id.*

16. *Id.* at 294-95 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1547, 82 U.N.T.S. 279, 286, 288).

17. *Id.* at 295-96.

18. *Id.* at 295 (citing 1950 U.N. Declaration of the Principles of the Nuremberg Charter and Judgment, *cited in* M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 141 (1987)).

The U.N. General Assembly adopted the Genocide Convention in 1948, which defined genocide and provided that an accused could be tried in a court of the state where the conduct occurred or in an international court if the states concerned were willing to relinquish jurisdiction to it.[19] The four Geneva Conventions, which opened for signature in 1949, bound signatory states to penalize, under domestic law, acts considered "grave breaches" of the convention, such as failure to protect wounded or sick soldiers, sailors, prisoners, and civilians.[20] Two Additional Protocols were added to the Geneva Conventions in 1977, which concerned the duties of states to protect individuals in international *and* non-international armed conflicts.[21]

While the Genocide and Geneva Conventions were being drafted, the United Nations General Assembly asked the International Law Commission ("ILC"), an organization that is often given the task of codifying and developing international law, to study the possibility of creating a permanent international criminal court.[22] The ICC produced two drafts of potential legislation in attempts to establish an international criminal court, but further work was halted when the intensifying Cold War political and ideological battles made such a forum increasingly unfeasible.[23]

In 1989, Trinidad and Tobago refocused attention on the possibility of an international criminal court, by proposing that one be created to deal with international drug trafficking.[24] In 1992,

19. *Id.* (citing Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 102 stat. 3045, 78 U.N.T.S. 277, 280, 282 (1950).)

20. *Id.* (citing Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 3146, 5 U.N.T.S. 31, 62; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 51, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85, 116; Geneva Convention Relative the Treatment of Prisoners of War, Aug. 12 1949, art. 130, 6 U.S.T. 3316, 3420, 75 U.N.T.S. 135, 238; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287, 388).

21. *Id.* at 296 (citing Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the victims of international armed conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to protections of victims of non-international armed conflicts, June 8, 1977, 1125 U.N.T.S. 609).

22. *Id.* (citing G.A. Res. 260B, U.N. GAOR, 3d Sess., 179th mtg. at 177, U.N. Doc. A/810 (1948)).

23. *Id.* (citing M. Cherif Bassiouni, Observations Concerning the 1997-98 Preparatory Committee's Work, *in* International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; Administrative and Financial Implications 5, 5 (M. Cherif Bassiouni ed., 1997)).

24. *Id.* at 297.

compelled by the atrocities occurring in the former Yugoslavia, the General Assembly requested that the ILC make it a priority to draft a statute for the creation of a permanent international criminal tribunal.[25] One year later, a draft ICC statute was submitted by the ILC to the General Assembly.[26]

Also in 1993, when reports of violations of international humanitarian law coming out of the former Yugoslavia began to increase, the Security Council created the ICTY.[27] The ICTY was granted subject matter jurisdiction over grave breaches of the Geneva Conventions, violations of laws and customs of war, crimes against humanity, and genocide.[28] This milestone in the global commitment to international criminal law led to the establishment of the International Tribunal for Rwanda a year later and enhanced the outlook for establishing a permanent international criminal court.[29]

Finally, in July of 1998, after five years of negotiations, the international community overwhelmingly approved the ICC Statute as 120 nations voted yes and only seven voted no.[30] The seven that voted no were the U.S., Israel, China, Iraq, Libya, Qatar, and Yemen.[31] President Clinton did eventually sign the treaty only hours before the deadline of December 31, 2000.[32] However, he signed only to ensure that the U.S. would be able to participate in and have an effect on the ICC in future negotiations before it comes into existence—despite his continued belief that the ICC Statute was a

25. *Id.* (citing G.A. Res. 47/33, U.N. GAOR 47th Sess., 73d mtg. at 3, U.N. Doc. A/RES/47/33 (1992)).

26. *Id.* at 298 (citing Report of the Working Group on a Draft Statute for an International Criminal Court, U.N. GAOR, 48th Sess., Supp. No. 10, Annex, U.N. Doc. A/48/10 (1993)).

27. *Id.* at 291, 297. *See* The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993); S.C. Res. 752 U.N. SCOR, 47th Sess., 3075th mtg. at 2-3, U.N. Doc. S/RES/752 (1992); S.C. Res. 757 U.N. SCOR, 47th Sess., 3082d mtg. at 2-6, U.N. Doc. S/RE/757 (1992)).

28. Pejic, *supra* note 11 at 297 (citing Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, Annex, arts 2-5, at 36-38, U.N. Doc. S/25704 (1993)).

29. *Id.* at 297-98 (citing The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in Rwanda ("ICTR"), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994)).

30. Geopolitics, *supra* note 6.

31. *Id.*

32. Clinton's Statement on War Crimes Court, BBC News, Dec. 31, 2000 *at* http://news.bbc.co.uk/hi/english/world/newsid_1095000/1095580.stm (last visited Jan. 3, 2002).

flawed treaty that would never be ratified by the Senate.[33] China, Cuba, Iraq, Libya, Qatar, and Rwanda did not sign the treaty by the deadline and have yet to sign it.[34]

According to Article 126 of the ICC Statute, it will not become effective until sixty countries have ratified the treaty.[35] As of January 2, 2002, forty-eight states had ratified the treaty, many of which are U.S. allies, including the United Kingdom, France, Germany, Italy, and Canada.[36] Yugoslavia has also ratified the treaty; however, as evidenced by the ASPA, the U.S. is a long way from cooperating with the ICC, much less ratifying the treaty.[37] The requisite sixty ratifications are expected to be achieved by the end of 2002.[38]

II. Creation

A. The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The initial will to create the ICTY did not actually originate within the Security Council and the governments of the powerful states that control it.[39] The ICTY was not created because of the inherent value in punishing war criminals nor to fortify the rule of law.[40] Rather, the grisly pictures beamed around the world by television networks mobilized the citizenry of the powerful states, and in turn, the political institutions that control the Security Council.[41]

In 1993, the Security Council issued Resolution 808, which stated that an international tribunal would be established to prosecute persons responsible for committing serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.[42] However, the resolution did not indicate how such an international tribunal was supposed to be established or on what legal

33. *Id.*

34. Rome Statute of the International Criminal Court Ratification *at* http://www.igc.org/ html/country.html (last visited Feb. 8, 2002) [hereinafter Ratification Status].

35. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF,183/9, art. 126 at 87 (1998) [hereinafter ICC Statute].

36. Ratification Status, *supra* note 34.

37. *Id.*

38. *Id.*

39. Macao Matua, *Never Again: Questioning The Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 174 (1997).

40. *Id.*

41. *Id.*

42. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

basis.[43] The Secretary General defended the action and pointed out that the Security Council had, on other occasions, passed resolutions under Chapter VII aimed at restoring and maintaining international peace and security, which involved the establishment of subsidiary organs for other purposes.[44] In defending Resolution 808, the Secretary General made reference to Security Council Resolution 687 (1991) and subsequent resolutions relating to the situations between Iraq and Kuwait.[45]

Unfortunately, the General Assembly had little involvement in the ICTY's creation.[46] China, Russia, Brazil, Mexico, and Yugoslavia all voiced concerns that the Security Council, not the more democratic forum of the General Assembly, was being utilized.[47] One of the many disadvantages to not employing the General Assembly is that if the Security Council acts in relation to a situation, the General Assembly cannot make recommendations unless invited by the Security Council.[48]

The Secretary General stated two reasons why the ICTY was created through the Security Council as opposed to the General Assembly.[49] The Secretary General's first reason was that he was concerned that a treaty might not be ratified by some member states that were considered integral to its success.[50] "[T]here could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is truly to be effective."[51] Nevertheless, the General Assembly can be seen as having given its consent to the ICTY's creation by the Security Council because the General Assembly nominated the ICTY's judges, approved its budget, and passed resolutions in support of the tribunal.[52] However, the General Assembly was not allowed to object in any manner to the

43. *Id.*

44. United Nations: Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 I.L.M. 1159, 1169 (July 1993) [hereinafter Sec. Gen. Report].

45. *Id.*

46. *Id.* at 1168.

47. *See* Joshua M. Koran, *An Analysis of the Jurisdiction of the International Criminal Tribunal for War Crimes in the Former Yugoslavia,* 5 ILSA J. INT'L & COMP. L. 43, 49, n.29 (1998).

48. UN CHARTER arts. 11(2), 12, 24.

49. Koran, *supra* note 47, at 49.

50. *Id.*

51. *Id.* (quoting Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993)).

52. *Id.*

ICTY's language, jurisdiction, sanctions powers, criminal procedure and evidence rules, or even structure, such as its lack of an Office of Defense.[53]

Second, it was believed that utilizing the Security Council would expedite the process.[54] In fact, the ICTY's rules of criminal procedure were drafted in less than four months, and the tribunal was completed in less than seven months.[55] The speed with which the ICTY was created resulted in imprecise drafting of the statutory language.[56] For example, Article I stated that the ICTY had the power to "prosecute persons responsible" for serious violations, but if drafted with precision, the statute would have stated that the ICTY had the power "to try persons allegedly responsible for" or "accused of" serious violations.[57] That is, before someone is prosecuted *and* convicted, they are not considered to be responsible for a crime.[58]

Conversely, the care put into negotiation of a treaty combined with utilization of the General Assembly considerably minimizes even the most minute flaws. Although many international officials and scholars believed that achieving unanimity in the General Assembly would have taken much longer than it did in the Security Council, the General Assembly has in fact passed resolutions concerning the Yugoslavia situation that were not prompted by the Security Council.[59] Despite the lack of Security Council involvement, these resolutions have been honored.[60]

B. The ICC

The treaty approach to the establishment of the ICC had the advantage of allowing for a "detailed examination and elaboration of all the issues" that are involved in an international tribunal.[61] The Secretary General has acknowledged that the treaty approach has an

53. *Id.* at 49-50.

54. *Id.* at 50.

55. *Id.*

56. *Id.*

57. *Id.* (quoting Howard S. Levre, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 26 (1995)).

58. *Id.*

59. *Id.*; Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT'L L. & POL. 417, 438 (1999).

60. Bodley, *supra* note 59. (citing G.A. Res. 48/88, U.N. GAOR, 48th Sess., Agenda Item 42, U.N. Doc. A/RES/48/88 (1993) (urging Security Council to lift arms embargo on Bosnia)).

61. Sec. Gen. Report, *supra* note 44, at 1168.

advantage, because it allows the states participating in the negotiation and conclusion of the treaty to fully exercise their sovereign will.[62] This sovereign will is executed when deciding whether or not to become a party to a treaty.[63]

Many states and scholars also prefer the treaty approach because it often utilizes the General Assembly, a truly representative and democratic forum.[64] Some crucial advantages of establishing a tribunal by treaty are: (1) the participation of all United Nations member states gives it greater legitimacy; (2) signatory states can not later dispute the legitimacy of its establishment, and (3) a generality of states considering themselves legally bound to a treaty would provide evidence of the consensus necessary to create international customary law, which would eventually bind even non-signatory states if they do not persistently object.[65]

Establishing the ICC by treaty gives it many advantages over, and greater legitimacy than, the ICTY's creation through a Security Council resolution. This greater legitimacy will help to minimize the perception that the ICC dispenses victor's justice, thereby better promoting long-term peace and reconciliation.

III. Legal Legitimacy

A. The ICTY

Many States and organizations that have drafted tribunal statutes, such as the draft of the Conference on Security and Cooperation in Europe ("CSCE"), have questioned the legal legitimacy of the ICTY's creation.[66] The CSCE draft took the view that such a tribunal could only be created by a convention or through the influence of the General Assembly.[67]

The source of international law often determines which court will have jurisdiction.[68] For instance, when international law originates from a treaty, the treaty is first studied to determine the appropriate

62. *Id.*
63. *Id.*
64. Koran, *supra* note 47, at 48.
65. *Id.*
66. Bodley, *supra* note 59.
67. *Id.*
68. Koran, *supra* note 47, at 56-57.

judicial body.[69] When international law originates from custom, custom is first studied to determine the appropriate judicial body.[70]

Treaties often obligate the contracting states to prosecute certain criminal offenses listed in the treaty, but both national and multinational courts can be granted jurisdiction to try criminal violations of international law.[71] However, no treaty which defines war crimes authorizes the ICTY to try alleged violations.[72] Moreover, no international agreement that codifies international humanitarian law grants to the United Nations the power to adjudicate individual criminal cases.[73]

It has been argued that the ICTY is legally illegitimate, because its creation by the Security Council through the UN Charter was *ultra vires*, and therefore, violates Article 14(1) of the International Convention on the Protection of Civil and Political Rights ("ICCPR").[74] The ICCPR is an important treaty concerning international humanitarian law, and Article14(1) guarantees an accused the right to be tried by a tribunal "established by law." [75] However, what does "established by law" mean?

Defense council for Dusko Tadic, the first defendant to appear before the ICTY, argued before the Trial and Appeals Chambers that "established by law" meant law passed by a legislative body, and therefore, the ICTY was not a legally legitimate tribunal and violated 14(1).[76] The European Commission on Human Rights and the European Court of Human Rights agreed with this interpretation when examining the European Convention on Human Rights.[77]

Yet, the Secretary General stated that in establishing the ICTY, the Security Council was not creating or purporting to "legislate" that law.[78] Rather, the international tribunal would have the task of applying existing international humanitarian law.[79] Additionally, by requiring a tribunal to be established by a legislature, judge made law and customary law, including customary international law, might

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 58.
73. *Id.* at 61.
74. *Id.* at 51, 61.
75. *Id.*
76. *Id.* at 50-52.
77. *Id.* at 52.
78. Sec. Gen. Report, *supra* note 44.
79. *Id.*

cease to be law.[80] War criminals are charged with many crimes that stem from customary international law.[81] Therefore, the Appeals Chamber decided that since there is not an international legislature that can promulgate binding laws on individuals, this interpretation of a tribunal "established by law" did not apply to the international sphere.[82]

However, if the Security Council can't create international law that is binding on individuals, how can the Security Council legally create a judicial body whose jurisdiction is binding on individuals?[83] Given that the ICTY's creation expanded the jurisdiction of international political bodies to try individuals, the Security Council can be seen as having in fact prescribed international law *ultra vires*.[84]

A second viable interpretation of "established by law" is that a court is legally created by a political body, such as the Security Council, whose decisions are binding on other political branches within its organizational structure.[85] The Appeals Chamber concluded that ICTY should be considered "established by law" if the Security Council acted within its enumerated powers under the United Nations Charter.[86] Therefore, if the Security Council can make binding decisions on the Secretary General or the General Assembly on issues within its enumerated powers then the ICTY was "established by law."[87]

The Security Council can in fact make binding decisions on other political organs within the United Nations; however, its enumerated powers do not include jurisdiction and the ability to make binding decisions over individuals.[88] As the Appeals Chamber indicated, the Security Council under Chapter VII has authority to take action in the former Yugoslavia, but the ability to act does not increase the scope of what action they can choose or give it the power to create a criminal court legally binding on individuals.[89] In addition, the precedent setting judgments of the ICTY create new international humanitarian law, a power beyond that of the organ that created it.[90]

80. Koran, *supra* note 47, at 53.
81. *Id.*
82. *Id.*
83. *Id.*
84. *See id.* at 53-55.
85. *Id.*
86. *Id.* at 53-54.
87. *Id.* at 54.
88. *Id.*
89. *Id.*
90. *Id.* at 55.

Given that a political body cannot delegate to a subsidiary organ power it does not have and the ICTY is not authorized to create new international law, it should be limited by the historical limits of the jurisdiction of the Security Council.[91] The Security Council has never asserted power over individuals in the past, and therefore, the ICTY cannot, under international law, have the power of jurisdiction over individuals.[92] The Security Council acted *ultra vires* by creating a subordinate body and granting it powers it could not exercise itself.

A third interpretation is that "established by law" means having fair procedures.[93] While the ICTY does satisfy this interpretation, this alone is probably not sufficient to satisfy Article 14(1) of the ICCPR.[94]

The Appeals Chamber ultimately dodged the issue by stating that Article 14(1) of the ICCPR applied only to national courts, which is consistent with a view that this right does not result from being a natural entitlement.[95] This view would mean that rights of the accused are different under international law than under national law.[96] Some scholars have argued that the Appeals Chamber might have been implying that the human rights belonging to individuals are less protected under international law than under national law.[97] Regardless, the Appeals Chamber's attempt to reconcile the ICTY's legal creation with the requirement of Article 14(1) was unsatisfactory. The simple fact that the ICTY's creation is incompatible with a key international humanitarian treaty clearly makes its legal legitimacy very questionable.[98]

B. The ICC

(1) Legal Legitimacy in Relation to Third Party States

A major U.S. objection to the legal legitimacy of the ICC is that it binds third party states who have not ratified the Treaty by subjecting their nationals to its jurisdiction.[99] Therefore, the U.S. argues that the ICC violates Article 34 of the Vienna Convention on

91. *Id.* at 62.
92. *Id.* at 63.
93. *Id.* at 56.
94. *Id.*
95. *Id.* at 51-52.
96. *Id.*
97. *Id.* at 50-51.
98. *See id.*
99. H.R. 1794, 107th Cong. (1st. Sess. 2001); S. 1610, 107th Cong. (1st Sess. 2001); James L. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. REV. 105, 134-35 (2000).

the Law of Treaties: "a treaty does not create either obligations or rights for a third state without its consent."[100] This objection involves the preconditions necessary for the ICC to have jurisdiction over an individual without a Security Council mandate.[101]

Absent a Security Council mandate, the accused must have either committed one of the enumerated crimes within the territory of a state party or be the national of a state party.[102] Therefore, nationals of a state not a party to the treaty can be tried by the ICC if the acts occurred within the territory of a state party.[103] This scenario does not create new obligations for the third party states.[104] A state's citizens are subject to foreign law when traveling abroad unless the situation is otherwise governed by a treaty or internal law that grants an exemption, such as a status of forces agreement or diplomatic immunity.[105] The right to specify how and where the trial should take place is certainly within the state's discretion.[106] This territorial jurisdiction to prescribe law is a result of the sovereign right to subject those within a state's borders to its domestic law.[107] When a state party ratifies the ICC Treaty, the agreement becomes part of that state's domestic law.[108] If the U.S. fails to ratify the ICC Treaty, its nationals will be subject to foreign law on foreign soil at that sovereign's discretion, just as before.[109]

More importantly, the ICC doesn't create new obligations for third party states concerning the right of each to police its own territory.[110] This right is inherent in the concept of sovereignty and can only be restricted by its consent or *jus cogens* norms.[111] The U.S. cannot credibly claim the ICC Treaty is legally illegitimate, because if it is not ratified by the U.S., party states will not be forced to grant immunity from the ICC's jurisdiction to Americans for acts occurring within their own sovereign territory.[112] The ICTY rather than the ICC

100. Taulbee, *supra* note 99 at 135; Vienna Convention on the Law of Treaties art. 34 [hereinafter Vienna Convention].

101. *See* Taulbee, *supra* note 99 at 135-36.

102. ICC Statute, *supra* note 35, art. 12(2).

103. *Id.*

104. *See* Taulbee, *supra* note 99, at 135-36.

105. *See id.*

106. *Id.*

107. *See id.*

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id. Jus cogens* norms are mandatory norms of international law from which no derogation is permitted.

112. *Id.*

works to bind third party states to obligations when state consent is lacking. Unlike the ICTY, the ICC does not have the express power to issue orders to a third party state such as: to defer jurisdiction, to cooperate with investigations, or to surrender suspects.[113]

The U.S. cannot credibly argue that the ICC Treaty is flawed because it applies to U.S. nationals on foreign soil without U.S. ratification, but does not apply to Saddam Hussein's acts within Iraq if that state does not ratify.[114] First, jurisdiction over internal affairs of a third party state would be considered a third party obligation created by treaty that would violate the Vienna Convention on Treaties.[115] Second, the Security Council can use the very United Nations Charter Chapter VII powers that created the ICTY to refer the situation in Iraq to the ICC, even if Iraq does not ratify the ICC Treaty.[116]

(2) Legal Legitimacy in Relation to the U.S. Constitution

Many U.S. critics have objected to the court on constitutional grounds. However, by juxtaposing U.S. extradition procedure with ICC procedure, it becomes apparent that there are no constitutional difficulties.[117] The major constitutional objection to ratifying the ICC is that the U.S. government cannot grant the ICC jurisdiction over its citizens, because (1) the ICC does not possess constitutional criminal procedural guarantees such as the right to trial by jury and (2) international criminal law is not sufficiently well defined to give fair notice and satisfy the due process standards of the U.S. Constitution.[118] The U.S. also argues that it is required to exercise potential jurisdiction whenever possible to ensure the existence of

113. *Compare* Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 29 [hereinafter ICTY Statute] and International Criminal Tribunal for the Former Yugoslavia Rules of Evidence and Procedure, rule 61, American Society for International Law, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 33 I.L.M. 484, 497 (1994) [hereinafter ICTY Rules of Evid. & Proc.] *with* ICC Statute, *supra* note 35, art. 12.

114. Taulbee, *supra* note 99, at 131-32, 150.

115. *Id.*; ICC Statute, *supra* note 35, 13(b); Vienna Convention, *supra* note 100, art. 34.

116. Taulbee, *supra* note 99, at 131-32, 150; ICC Statute, *supra* note 35, 13(b); Vienna Convention, *supra* note 100, art. 34.

117. *See* Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?*, 14 EMORY INT'L L. REV. 213, 245 (2000) (citing Senate Comm. on Foreign Relations, International Criminal Court, S. Rep. No. 103-71 19-20, 24 (1993); H.R. 1794, 107th Cong. (2001); S. 1610, 107th Cong. (2001)).

118. *Id.* at 245-49.

constitutional guarantees.[119] On the contrary, after examining established interpretations of Article III and the role of the U.S. judiciary, it becomes evident that the U.S. can constitutionally ratify and participate in the ICC.[120]

Ratifying the ICC Treaty would not implicate the structural provisions of Article III because the ICC is not a court of the United States.[121] Rather, the ICC is an independent international organization that acts under its own authority and applies its own law.[122] The ICC exercises the judicial power of the international community and not that of any individual state.[123] As there is no invocation of U.S. judicial power in the procedural structure of the ICC, difficulties under Article III do not arise.[124]

It has been demonstrated that the U.S. can participate in international law enforcement without implicating Article III.[125] The United States has routinely provided assistance to foreign countries in gathering evidence and detaining suspects under extradition or mutual assistance treaties, without it becoming the exercise of the judicial branch.[126] For example, in *Dames & Moore v. Reagan*, the judiciary was not involved when the U.S. suspended its claims and transferred the prosecution to an international tribunal created by bilateral agreement.[127] This separation between international criminal tribunals and U.S. jurisprudence is also indicated by *Hirota v. MacArthur*, where the International Military Tribunal ("IMT") convicted Japanese officials for crimes against humanity.[128] In deciding to deny the Japanese leave to institute a habeas action, the Supreme Court determined that the IMT was "not a tribunal of the United States" and "the courts of the United States [had] no power or authority to review, to affirm, to set aside or annul judgments and sentences."[129] Through this holding, the Court displays the

119. *Id.* at 250-51
120. *Id.* at 245.
121. *Id.*
122. *Id.*
123. *Id.* (citing Louis L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 198-99 (1972)).
124. *Id.*
125. *Id.* at 245-46.
126. *Id.* at 246.
127. *See id.* (citing Dames & Moore v. Reagan, 453 U.S. 654, 684-85 (1981); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713, n. 9 (1987) [hereinafter RESTATEMENT]).
128. *See id.* (citing Hirota v. MacArthur, 338 U.S. 197, 198 (1948) (per curiam)).
129. *See id.*

independent structural relationship that exists between the U.S. judicial system and an international criminal court.[130]

When compared with U.S. extradition law, the legal processes of the ICC further illustrate the lack of a conflict between the U.S. Constitution and ratification of the ICC Treaty.[131] In fact, the United States has participated in extradition treaties in the past that were "cooperative effort[s] of the international community to address criminal activities creating difficulties in several states."[132] The crimes to be charged by the ICC are not derived from U.S. law even though the U.S. could legislate the criminalization of those offenses.[133] The only role the U.S. would play if it ratified the ICC Treaty would be to detain and deliver the accused to the external jurisdiction of the ICC if the U.S. chooses not to prosecute.[134] This relationship is no different from that which exists between the judicial power of U.S. courts and extradition treaties.[135]

Examining the parameters of judicial review of extradition treaties reveals that constitutional objection to the ICC on the basis of inadequate ICC trial procedures is untenable.[136] Applying the rule of non-inquiry, U.S. courts do not consider the procedural or substantive rights the accused will have in the requesting state if the extradition is authorized by treaty.[137] The courts' inquiries are prevented pursuant to the rule that "by the existence of an extradition treaty [it will] assume the trial will be fair."[138] The courts are unable to inquire into the procedures the accused will experience, because that is the responsibility of the State Department.[139]

This rule of non-inquiry prevents U.S. courts from scrutinizing legal systems that differ substantially from that of the U.S., including systems that significantly limit a defendant's rights at trial, those that permit trial in abstentia, and those in which the defendant may face torture or death.[140] Conversely, the ICC provides for adequate

130. *See id.*
131. *See id.* at 246-47.
132. *Id.* at 247.
133. *Id.*
134. *Id.*
135. *See id.* (citing Austin v. Healey, 5 F.3d 598, 603 (2d Cir. 1993)).
136. *Id.* at 247-48.
137. *Id.* at 248-49.
138. *Id.* at 248 (citing Guksman v. Henkel, 221 U.S. 508, 512 (1911)).
139. *Id.* (citing Garcia-Guillen v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (citation omitted)).
140. *Id.* (citing Escobedo v. U nited States., 623 F.2d 1098, 1107 (5th Cir. 1980); Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960); In re Smith, 820 F. Supp. 498, 502 (N.D. Cal. 1993)).

protection of individual rights and is subject to those guaranteed by international law as specified in treaties and other sources of international law.[141] The protections afforded to a suspect by the ICC compare favorably with the minimal constitutional protections afforded to suspects under U.S. extradition treaties.[142] Thus, there cannot be valid constitutional objections to ratifying the ICC treaty due to inadequate trial procedures.[143]

Moreover, the U.S. has not asserted that U.S. citizens could not be tried under the trial procedures of the ICTY if their actions subject them to the ICTY's temporal and territorial jurisdiction.[144] If a U.S. soldier on a peace-keeping mission in Kosovo committed a war crime in 1998, according to the ICTY Statute, he would fall within the ICTY's jurisdiction and if brought into custody would be tried without a jury.[145]

The objection that international criminal law is unconstitutionally vague is also unfounded as the U.S. has already accepted definitions of crimes under international law as adequately precise.[146] For example, it has been determined that the international law definition of piracy is defined well enough to be incorporated into U.S. domestic law.[147] More importantly, the U.S. Supreme Court has decided that statutes drawing upon international law and providing for trials for violation of war crimes have been sufficiently well defined.[148] As stated, according to the ICTY Statute, an American could fall within its jurisdiction and would be charged with crimes defined by international law.[149]

Seeing as the ICC is prospective and "relies on existing treaties, the national laws implementing them," and already existing international norms, the treaty provides fair notice of subsequent

141. *Id.* (citing International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52-56, U.N. Doc. A/6316 (1966); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR. 3d Sess., at 135, U.N. Doc. A/810 (1948).

142. *Id.* at 248-49.

143. *Id.* In fact, the ICC standards of due process are considered by some to be considerably higher than those of military tribunals President Bush wants to set up for suspected terrorists. *See* Human Rights Watch, Europe Should Oppose U.S. Law on War Crimes Court, *at* http://www.hrw.org/press/2001/12/ASPeu1210.htm (last visited Jan. 21, 2002).

144. ICTY Statute, *supra* note 113, arts. 1, 8, 15, 23.

145. *Id.* arts. 1, 8, 23.

146. Bickley, *supra* note 117, at 249.

147. *Id.* (citing 18 U.S.C. § 1651 (1988); United States v. Smith, 18 U.S. 153, 161 (1820)).

148. *Id.* (citing *Ex Parte* Quirin, 317 U.S. 1, 29-30 (1942)).

149. *See* ICTY Statute, *supra* note 113, arts. 2, 3, 4, 5, 8.

prosecution for the enumerated crimes.[150] Despite the fact that a crime might be defined differently under U.S. law, extradition is not barred unless the underlying conduct does not constitute a serious crime in the U.S.[151] Therefore, even if the precise requirements of a trial under the U.S. Constitution are not met, the relationship between the U.S. and the ICC does not violate the Constitution on a procedural or substantive basis.[152]

Another U.S. objection is that it would be unconstitutional to allow an international criminal court to have jurisdiction over acts within U.S. territory, when the U.S. has custody of the suspect, or when the suspect is a U.S. citizen, because the U.S. would be forced to give up jurisdiction it would otherwise be entitled to exercise over the accused.[153] However, the Supreme Court has in fact "rejected the idea that the U.S. is required by the Constitution to exercise jurisdiction whenever possible" to ensure the existence of constitutional guarantees.[154] The U.S. is not forced to exercise jurisdiction over all crimes within its territorial boundaries as is evidenced by U.S. domestic practice and policy towards other nations.[155] There is extensive precedent for the constitutionality of extraditing defendants to foreign jurisdictions for trial based on acts committed within U.S. territory.[156]

The Constitution also does not prevent the U.S. from waiving jurisdiction it has abroad, even over crimes committed by its nationals.[157] Just consider the "long-standing U.S. rejection of the civil law of some" states that "utilize nationality-based jurisdiction under which they refuse to extradite their own nationals but offer to try them in a domestic court."[158] Given the opportunity, the U.S. has never and probably will never insist on giving a domestic trial to all

150. Bickley, *supra* note 117, at 249; *See generally* ICC Statute, *supra* note 35.

151. Bickley, *supra* note 117, at 249 (citing Demjanjuk v. Petrovsky, 776 F.2d 571, 579-80 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993)).

152. *Id.* at 249-50.

153. *Id.* (citing American Bar Association Task Force on an International Criminal Court, New York State Bar Association Joint Report with Recommendations to the House Delegates: Establishment of an International Criminal Court (Aug. 1993), *reprinted in* 27 INT'L LAW. 257, 268-69 (1993) [hereinafter American Bar]).

154. *Id.* at 251 (citing Wilson v. Girard, 354 U.S. 524, 530 (1957) (*per curiam*)).

155. *Id.*

156. *Id.* at 252 (citing Austin v. Healey, 5 F.3d 598 (2d Cir. 1993); Valencia v. Scott, Nos. CV 90-3745(RJD), CV 91-1959(RJD), 1992 WL 75036 (E.D.N.Y. Mar. 24, 1992); United States v. Melia, 667 F.2d 300 (2d Cir. 1981)).

157. *Id.* at 251 (citing Williams v. Froehlke, 490 F.2d 998, 1004 n.8 (2d Cir. 1974)).

158. *Id.* at 250 (citing American Bar, *supra* note 153, at 269).

U.S. citizens that are being sought for extradition.[159] The United States has repeatedly recognized extra-territorial criminal jurisdiction over non-nationals when exercising such jurisdiction. Therefore, it is hypocritical for the U.S. to now claim that it is barred by the Constitution from allowing a foreign court to apply the same principle to get jurisdiction over an American.[160] The Supreme Court has never indicated that a connection between the defendant or the crime and the U.S. would be grounds to defeat a claim to jurisdiction by a requesting state.[161]

Moreover, the ICC utilizes universal jurisdiction as a basis for extra-territorial authority over its enumerated crimes, and the United States has repeatedly recognized universal jurisdiction over these crimes.[162] In view of the fact that these crimes are already subject to foreign jurisdiction, the "United States cannot limit international jurisdiction by refusing to ratify the ICC treaty."[163]

The ICC is not a court of the U.S. under Article III. Consequently, its relationship to U.S. jurisprudence resembles the relationship between a foreign court and U.S. jurisprudence.[164] Through examination of the non-inquiry doctrine of extradition law, it becomes apparent that the rights guaranteed to an accused are adequate to defeat a constitutional challenge.[165] In addition, international criminal law does not violate due process, and the U.S. is not constitutionally required to exercise all potential jurisdiction.

U.S. ratification of the ICC Treaty would be legally legitimate because the Constitution does not bar the legal relationship that would exist between the ICC and United States jurisprudence. Conversely, the ICTY demanded that the former Yugoslavia change its constitution so it could cooperate with the court by extraditing its nationals.[166] The U.S. cannot claim that the ICC is legally illegitimate and maintain that the ICTY is not.

159. *Id.* at 251 (citing RESTATEMENT, *supra* note 127, § 475 n.4).
160. *Id.* at 252.
161. *Id.* at 253.
162. *Id.* at 251-52.
163. *Id.* at 252.
164. *Id.* at 248-54.
165. *Id.* at 248.
166. Bodely, *supra* note 59, at 437.

IV. Political Legitimacy

A. Sovereignty Considerations

(1) The ICTY

The principle of sovereignty bars "the exercise of jurisdiction by one state over issues and individuals within the territorial boundaries of another state."[167] The international community has repeatedly recognized sovereignty as the most sacred and fundamental right that a nation can possess.[168] Previously, Yugoslavia argued that its sovereignty was being violated, because, *inter alia,* its internal constitutional laws that prohibit extradition of its nationals, an internal restriction of many states, would have to be changed to comply with the ICTY.[169] In fact, at the insistence of Security Council and international donors, the government that replaced Milosevic had to thwart public opinion and overrule its constitutional court to facilitate his extradition to the ICTY.[170]

The Security Council undermined state sovereignty by creating the ICTY under its Chapter VII powers because it went against the wishes of the states that were closely involved.[171] State sovereignty is infringed upon when the ICTY demands extradition of nationals for public trials. Sovereignty is further diminished when the ICTY makes incursions into state territories for the purpose of collecting evidence that will be used to prosecute its nationals.[172] This disregard for state sovereignty only increases the feeling of subjugation in states that are already angered by a perceived prejudice against them.[173] In fact, a majority of Serbian citizens wanted Milosevic tried in Belgrade and

167. Bickley, *supra* note 117, at 255 (citing U.N. CHARTER art. 2, para. 7).

168. *Id.* (citing MICHAEL R. FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY, 11-12 (1995)).

169. Bodely, *supra* note 59, at 437. "[A]ll States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with ... orders issued by a Trial Chamber." ICTY Statute, *supra* note 113, art. 61 at 1189.

170. *See* The Agence France Press, *Most Serbs Disapprove of Milosevic Extradition,* (Jul. 3, 2001), *at* http://www.igc.apc.org/globalpolicy/intljustice/tribunals/2001/0713serb.htm (last visited Jan. 21, 2002); Coalition for an International Criminal Court, Milosevic Transferred to the Hague as ICC Moves One Ratification Closer to Entry into Force, *at* http://www.igc.org/icc/html/pressrelease20010628a.pdf (last visited Jan. 21, 2002) [hereinafter Milosevic Transferred].

171. *See* Bodely, *supra* note 59, at 437.

172. *Id.* at 439.

173. *Id.*

believed that the government was heavily pressured from the outside into violating its own rule of law by unconstitutionally extraditing him.[174] This precedent illustrates that the Security Council could easily use ad hoc tribunals for politically motivated attacks against other states that may potentially encounter troubles similar to those in Yugoslavia.[175] Even if this particular situation deserved setting a new precedent, the actions of the Security Council encroached significantly upon the sovereignty of the nations involved.

Yet, the deepest encroachment upon sovereignty results from the everyday powers that are granted to the ICTY and its prosecutor through the Statute and Rules of Procedure.[176] Article 8 of the ICTY Statute explains that the jurisdiction of the ICTY includes the entire land and water surface and air space of the former Socialist Federal Republic of Yugoslavia since January 1, 1991.[177] Therefore, the ICTY, through its agents "may travel to and within the territory of the former Yugoslavia . . . with or without permission from the states involved[,] [for] purpose[s] consistent with the mandate of the ICTY."[178] These agents must be admitted and cannot be arbitrarily detained or arrested.[179] ICTY representatives must be allowed access to destinations they wish to see if the request is consistent with the mandate of the ICTY.[180]

According to Rule 61, the ICTY can request all U.N. Member Nations to take active roles in the arrest and capture of indicted war criminals, including freezing assets.[181] In addition, Article 9 gives the ICTY concurrent and superior jurisdiction to all national courts, including those within the territory of the former Yugoslavia.[182] The ICTY has primacy over national courts, and at any stage of the procedure may formally request the national courts to defer the case to the ICTY.[183]

174. *See* Milosevic Transferred, *supra* note 170.

175. *See id.*

176. Bodley, *supra* note 59, at 454 (citing ICTY Statute and ICTY Rules of Evid. & Proc., *supra* note 113).

177. *Id.*

178. *Id.*

179. *Id.* This is supported by Article 39 of the ICTY Statute which grants privileges and immunities to the Tribunal, particularly the judges, the Prosecutor and his staff, and the Registrar and his staff.

180. *Id.*

181. Bodley, *supra* note 59, at 454 (citing ICTY Statute and ICTY Rules of Evid. & Proc., *supra* note 113, rule 61.)

182. Bodley, *supra* note 59, at 454 (citing ICTY Statute, *supra* note 113, art. 9).

183. *Id.*

Rule 9 of the ICTY Rules of Evidence and Procedure states that when it appears to the prosecutor that: (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime; *or* (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; *or* (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the [t]ribunal, the Trial Chamber can request that the State defer to the competency of the court.[184] The key provision is (iii), because it grants the ICTY prosecutor almost unlimited discretion to make a national court defer to the ICTY. Once the prosecutor decides to pursue an individual, a national court's investigation and prosecution, whether already undertaken or not, will almost certainly concern legal and factual implications that bear upon a proceeding before the ICTY. In fact, the first ICTY prosecutor, Richard Goldstone, stated that the ICTY's primacy over a national court's jurisdiction is an invasion of sovereignty.[185]

The ICTY Statute compels all states, not just U.N. members, to cooperate fully. As a result, the ICTY gravely infringed upon the sovereignty of the newly independent states emerging from the former Yugoslavia by compelling their compliance before they became U.N. members.[186] The new states were also required to change or amend their domestic law if necessary to cooperate with orders from the Trial Chamber.[187] State sovereignty is probably most significantly infringed upon when a state is unable to withhold evidence to safeguard its national security unless approved by the

184. ICTY Rules of Evid. & Proc., *supra* note 113, rule 9.

185. U.N. CHRON., vol. 33, no. 2, ISSN: 0251-7329, June 22, 1996 at 2, 4-5 [herinafter U.N. CHRON.].

186. *See* Bodely, *supra* note 59, at 466-67.

187. *See id.* 465-466 (citing Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of July 18, 1977, at 3-4, Case No. IT-95-14-A12108bis (Oct. 29, 1997), at http://www.un.org.icty/blasic/trialc1/decisionse/70718sp2.htm (last visited Mar. 15, 1999) [herinafter Judgment on Request]).

Trial Chamber.[188] Such serious encroachments upon sovereignty have understandably resulted in some states refusing to cooperate.[189]

(2) The ICC

The ICC Statute shows great deference to state sovereignty. State sovereignty continues to play an integral role in international relations, but no nation can expect to shield its affairs from any and all external influence.[190] Sovereign powers, immunities, and privileges are subject to limitations despite their continued force and control in international relations.[191] Over fifty years ago, the Nuremberg Judgments established that state sovereignty was not an acceptable defense when prosecuting individuals for violations of international human rights law.[192]

Ratifying the ICC and playing a role in human rights treaties is consistent with a sovereign state's responsibility to protect its nationals.[193] Even if becoming a party to an international agreement is seen as sacrificing a small amount of sovereignty, through this agreement the state is able to gain protections that broaden and enhance its sovereignty and power to protect its citizens.[194]

In addition, sacrificing a small amount of sovereignty through ratifying a treaty can be seen as an exercise of that sovereignty.[195] For example, Liechtenstein has often exercised its national power by choosing to forego making foreign relations decisions in favor of

188. *See id.* at 467 (citing Press Release, International Criminal Tribunal for the Former Yugoslavia, Subpoena Issue—The Appeals Chamber Unanimously Quashes the Subpoena Duces Tecum Issued to Croatia and the Defense Minister (Oct. 29, 1997), *at* http://www.un.org/ICTY/p253-e.htm (last visited Mar. 15, 1999) [hereinafter Subpoena Issue]).

189. William Miller, Comment, *Slobodan Milosevic's Prosecution by the International Criminal Tribunal For the Former Yugoslavia: A Harbinger of Things to Come for International Justice*, 22 LOY. L.A. INT'L & COMP. L. REV. 553, 556-67 (2000) (citing Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 HOFSTRA L. & POL'Y SYMP. 37, 39 (1999)).

190. *See* Bickley, *supra* note 117, at 259 (citing Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 432 (1995)).

191. *See id.* (citing Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1695 (1995)).

192. *See id.* at 256-57 (citing Henry T. King, Nuremberg and Sovereignty, Address Before the American Bar Association Annual Meeting (Aug. 7, 1995), *in* 28 CASE W. RES. J. INT'L L. 135, 136 (1996)).

193. *See id.* at 261 (citing Brand, *supra* note 191, at 1696).

194. *See id.* (citing Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 391-92 (1992)).

195. *See id.* at 259-61.

those made by Switzerland.[196] Unlike the states subject to the ICTY, parties to the ICC treaty exercise the sovereign power of consent and do not have legal processes imposed upon them by more powerful states.

The ICC is not intended to displace functioning national judicial systems. The aim is to prevent impunity when an independent and effective judicial system is unavailable.[197] The ICC must defer to national courts, except in cases when those courts are "unwilling or unable [to] genuinely" investigate or prosecute.[198] This principle is called "complementarity" and can be invoked by interested sovereign states and by an accused to block court encroachment upon sovereignty.[199]

Exceptions to the basic presumption of deferral to national courts are very limited, especially when compared to the ICTY's primary jurisdiction. Such authority gives the ICTY wide latitude to decide which cases it would like to intervene in and hear. "Unwillingness" in effect requires that national proceedings be undertaken in bad faith before the ICC can intercede.[200] The use of established and transparent judicial procedures precludes a finding of unwillingness.[201] Moreover, a finding of unwillingness is not made merely because an investigation did not result in prosecution.[202] If a state in good faith fulfills its duty to investigate and decides not to prosecute, the ICC cannot act.[203]

"Inability" means "a total or substantial collapse or unavailability" of the national courts.[204] This exception would only apply when a state's judiciary has substantially ceased to function and not when it has an independent and functioning judicial system.[205] Complementarity is a concept that does not affect the sovereign independence of national courts, because the ICC does not act as an

196. The Learning Network Inc., Liechtenstein: Land People, Economy, and Government, *at* http://www.infoplease.com/ce6/world/A0859278.html (last visited Jan. 23, 2002).

197. Lawyers Committee for Human Rights, The United States Debate: Why the U.S. Should Ratify the Rome Treaty Establishing the International Criminal Court, part III-C, (adapted from "*The International Criminal Court: The Case For U.S. Support*") *at* http://www.igc.apc.org/icc/index.html [hereinafter U.S. Should Ratify].

198. ICC Statute, *supra* note 35, art. 17.

199. *Id.*

200. *Id.* art. 17(2).

201. U.S. Should Ratify, *supra* note 197.

202. *Id.*

203. *Id.*

204. ICC Statute, *supra* note 35, art. 17(3).

205. U.S. Should Ratify, *supra* note 197.

appellate court that second guesses a lower court's determinations of fact and law relating to the merits of a case.[206]

B. U.S. Political Control and Influence

(1) The ICTY

The ICTY is a judicial organ of the Security Council, but was intended to function independently of political considerations and not under the authority or control of the Security Council with regard to the performance of its judicial functions.[207] Yet, the decision of when to create an ad hoc tribunal is, in itself, a political decision. Richard Goldstone has stated that he believes it is unjust for an inherently political body like the Security Council to decide in Yugoslavia and Rwanda what laws will be enforced while it ignores other conflicts around the world.[208] In fact, the Security Council ignored the genocide in Rwanda for years after creating the ICTY. It took a formal request from that weary and war-torn country before the ICTY was even considered. Mr. Goldstone agreed with the objections of the Federal Republic of Yugoslavia that the creation of the ICTY was a political decision that resulted in discrimination.[209]

Yugoslavia and others have argued that an independent tribunal, especially an international one, cannot be a subsidiary organ of any political body, including the Security Council.[210] The status of the Security Council as a political body generated widespread fear of its inadequacy to sit in judgment of those accused of war crimes and other atrocities. As a result, the Security Council created another organization to act instead.[211] However, the tribunal cannot truly be independent because it depends upon the Security Council for its mandate and continued existence as a subsidiary organ.[212] The Security Council controls the very life span of the ICTY, so it is guaranteed to be responsive to the Security Council's political goals.[213] Former ICTY Judge Gabrielle Kirk McDonald even acknowledged

206. ICC Statute, *supra* note 35, art. 17.
207. Sec. Gen. Report, *supra* note 44.
208. U.N. CHRON., *supra* note 185, at 1.
209. *Id.*
210. Bodely, *supra* note 59, at 436, 452-54.
211. *Id.* at 452.
212. *Id.*
213. *Id.* at 453.

the subordinate relationship of the ICTY to the Security Council when she described it as a "creature" of the Security Council.[214]

The ICTY's use of Rule 61 best exemplifies its dependence upon the Security Council. The ICTY uses Rule 61 when an initial warrant has not been executed and, as a result, the indictment has not been served upon the accused.[215] After a Trial Chamber finds reasonable grounds for believing that the accused has committed the crimes charged, it endorses the indictment and issues an international arrest warrant.[216] An important aspect of this process is notifying the Security Council. For example, if the prosecutor convinces the Trial Chamber that the failure to personally serve the accused was a result in whole or in part of a failure or refusal of a state to cooperate, the prosecutor notifies the Security Council so that its orders are enforced.[217] When the ICTY under Article 29 makes a demand or request, it must turn to the Security Council for enforcement.[218] Clearly the ICTY is far from being independent as the Security Council is its ultimate enforcement mechanism.

In the case of *Prosecutor v. Tihomir Blaskic*, the Appeals Chamber decided that the ICTY did not have the power to issue a subpoena or enforcement measures against sovereign states.[219] Furthermore, the Appeals Chamber concluded that the appropriate legal remedy was for the court to make a finding of non-compliance with a request and then refer the matter to the Security Council for enforcement.[220] The Security Council need not act on every occurrence of noncompliance, and may therefore exercise discretion in choosing which ICTY orders will be enforced. When backed by an entity as untouchable as the Security Council, the structure, function, and broad powers of the ICTY can be used effectively as a powerful political tool.[221]

For example, the prosecutor is responsible for conducting investigations and submitting indictments to the Trial Chamber and has almost complete discretion as to whom the ICTY does and does

214. *Id.* (citing Supeona Issue, *supra* note 188).

215. Bodely, *supra* note 59, at 456-57 (citing ICTY Rules of Evid. & Proc., *supra* note 113, at rule 61).

216. *Id.*

217. *Id.*

218. *Id.* at 456-57 (citing ICTY Statute, *supra* note 113, art. 29).

219. *Id.* at 463. (citing Judgment on Request, supra note 187.)

220. *Id.* (citing Supeona Issue, *supra* note 188.)

221. *Id.* at 466-67 (citing M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 238 (1996)).

not prosecute.[222] While this gives off the appearance of independence, the prosecutor is actually powerless without the Security Council's backing. Even though Richard Goldstone's team successfully accumulated evidence and indicted many alleged criminals, the Security Council refused to permit U.N. forces to take the necessary steps towards arresting suspects.[223] One major suspect, Ratko Mladic, a former Bosnian Serb military chief, enjoyed skiing outings within sight of NATO forces who were not authorized to make arrests.[224] Another suspect even visited a U.N. police station to file a complaint and was neither recognized nor detained.[225] Bosnian Serb leader Radovan Karadzic lived the life of a celebrity by appearing at political rallies and publishing a best-selling volume of poetry in Greece.[226] The prosecutor's power is limited in what it can do to capture a suspect as it must rely on the Security Council's political agenda.[227]

Even before Milosevic's formal indictment, his treatment by the ICTY was greatly affected by the political process.[228] Milosevic signed the Dayton Peace Accords, talks which were supposed to help bring peace to the region, only after being granted de facto immunity from prosecution by the ICTY.[229] This early political concession to Milosevic displays the degree to which the ICTY is dependent on the Security Council's political agenda.[230] In fact, it is likely that Milosevic would never have been extradited without the political pressure that the Security Council placed on Yugoslavia's new government.[231] As an organ of the Security Council, the ICTY can only do its job when the Security Council permits.

222. ICTY Statute, *supra* note 113, arts. 15-16.

223. Robert Marquand, *Bosnia War Crimes Judge Talks of Quitting: Wants West to Capture Big Fry*, CHRISTIAN SCI. MONITOR, Oct. 22, 1996, at 1.

224. K.C. Swanson, *Troubled Tribunal*, 13 NAT'L J. 739 (1996).

225. Jovan Kovacic, *U.S. Envoy Warns Serb President to Aid Tribunal*, B. GLOBE, Nov. 8, 1996, at A2, *available at* 1996 WL 6885098.

226. *Alleged Serb War Criminal Turns Poetic: Book By Karadzic is a Big Seller in Greece*, CHI. TRIB., Dec. 25, 1996, at 20, *available at* 1996 WL 2739488.

227. *See* Miller, *supra* note 189, at 560-67 (citing Judge Gabrielle Kirk McDonald, Address to the United Nations General Assembly (Nov. 8, 1999), *at* http://www.un.org/icty/pressreal/p445-e.htm)).

228. *See* Miller, *supra* note 189, at 567-68 (citing M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 418-19 (2000)).

229. *Id.* (Milosevic's later military actions in Kosovo breached the peace process and negated his immunity).

230. *Id.* at 418.

231. Milosevic Transferred, *supra* note 170.

The Security Council created the ICTY when confronted with the international political decision of whether to become involved in the crisis in the former Yugoslavia.[232] Some have argued that a war crimes tribunal does not exclude military action.[233] That is, the United Nations was not required to view the ICTY as pre-empting the use of force to impose a settlement in the former Yugoslavia.[234] If that is true, the Security Council could use the military to defeat aggressive forces and then prosecute those defeated in a war crimes tribunal.[235] However, this relationship between military force and a war crimes tribunal produces victor's justice. A better solution is to genuinely incorporate force, diplomacy, and a tribunal.[236] This approach would produce a fair outcome that parties would be psychologically committed to and more likely to pass on to future generations to prevent recurring conflict.[237]

Laws that cannot be applied or enforced without prejudice do little to redress transgressions and deter future violations.[238] Whether an ad hoc tribunal should be created is a decision involving a selective process that is subject to the whim of powerful states.[239] A truly international tribunal is needed that can operate more freely from politics, recognize the importance of national courts, and apply a uniform standard of international criminal law to internal conflicts everywhere.[240] When a national court lacks credibility with those being prosecuted, an international tribunal virtually unrestrained by political considerations would be an extraordinary asset.[241] However, the ICTY is prevented from filling this role by the political atmosphere in which it was created and exists.[242]

It is not a surprise that only the treaty approach was advanced by the special rapporteurs on Bosnia, Herzegovina, and Croatia when

232. Matua, *supra* note 39.

233. *Id.* at 175 (citing Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 293 (1992) (reviewing TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS. (1992))).

234. Matua, *supra* note 39, at 175.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 179.

239. *Id.* (citing Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995)).

240. *Id.*

241. *Id.* In fact, trying international terrorists in the ICC would result in greater international perception of legitimacy surrounding the proceedings and could eventually bring countries and peoples into more trusting relationships.

242. *Id.*

they considered how to create a tribunal within the framework of the Conference on Security and Cooperation in Europe Moscow Human Dimension Mechanism.[243] The correspondents concluded that because the CSCE is as a political body, it does not possess the legitimacy or competence to establish a tribunal through a resolution and that only a treaty could be legitimately utilized.[244] This conclusion is just as easily reached when considering whether the Security Council, as a political body, could legitimately create the ICTY.

(2) The ICC

(a) Security Council Trigger Mechanism

An examination of the trigger mechanisms used to start an investigation in the ICC is important in analyzing U.S. political influence and control over the ICC. The ICC Treaty enables the Security Council to refer situations according to its power under Chapter VII of the U.N. Charter.[245] When the Security Council makes a referral, the ICC is able to exercise jurisdiction without considering whether any interested countries have accepted the ICC's jurisdiction.[246] Therefore, only the Security Council is able to exercise the most powerful jurisdictional reach of the ICC. The Security Council, under its Chapter VII powers, can refer any situation it deems appropriate, even in situations where the interested countries are not members of the United Nations.[247] The implication of this setup is that the Security Council may never refer its own members to the ICC, because each state wields the veto power on all Security Council actions.

Moreover, the Security Council will have the power to defer investigations or prosecutions for perpetually renewable twelve-month periods.[248] Most likely, the members of the Security Council will act cohesively with self interest in rejecting political attacks on any Security Council member. Each party state will want assistance from the other members in defending future political attacks through

243. Roman A. Kolodkin, *An Ad Hoc International Tribunal For the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 381, 386 (1995) (citing CSCE Rapporteurs (Corell-Türk-Thune), CSCE Moscow Human Dimension Mechanism to Bosnia, Herzegovina, and Croatia, *Proposal for an International War Crimes Tribunal for the Former Yugoslavia*, UN Doc 5/25307 (1993)).

244. *Id.*

245. ICC Statute, *supra* note 35, art 13(b).

246. *U.S. Should Ratify*, *supra* note 197, at III(D).

247. *See* U.N. CHARTER art. 2, para. 6 and art. 24, para. 1.

248. ICC Statute, *supra* note 35, art. 16.

the ICC. As a result, each member nation will cooperate to help the current member under attack through perpetual deferral. The level of protection afforded to one party state will be afforded to all.

Interestingly, even if the United States does not ratify the ICC Treaty, it can control the ICC through the Security Council. The United States has many shields against political attacks by any ICC party or prosecutor. However, the states in the former Yugoslavia have no ability whatsoever to defend political attacks launched against them by the Security Council or prosecutor through the ICTY. In contrast to the ICC, the ICTY does not have adequate procedural safeguards to prevent political attacks.

Therefore, it is hard to accept the argument of many opponents of the ICC, such as Senator Jesse Helms (R-NC), that the ICC is an attempt to do an "end run" around the Security Council.[249] The absolute veto privilege possessed by individual members is resented by numerous developing countries. Similarly, many U.S. allies believe that extending absolute veto privileges to ICC investigations and prosecutions would compromise the principle of a uniform global standard of justice.[250] Interestingly, the most vocal critics of the Security Council, India, Iraq, and Libya, refused to support the treaty, while three of the five members of the Security Council voted for it.[251]

(b) Prosecutor Trigger Mechanism

The ICC Treaty permits the prosecutor to initiate an investigation on her own motion (*propio motu*). However, there are many safeguards that ensure this power is not used for political attacks.[252] This prosecutorial power is necessary for the ICC to be effective, because the other trigger mechanisms will sometimes be unreliable. The Security Council, as a political body, may not be able to refer situations if only one of its members disagrees. In addition, states may be reluctant to refer matters involving another state's nationals if doing so might interfere with diplomatic or economic relations or invite retaliation.[253] Therefore, an independent

249. *U.S. Should Ratify*, *supra* note 197, at III(D); Cheryl K. Moralez, *Establishing an International Criminal Court: Will It Work?*, 4 DE PAUL INT'L J. 135, 150-51 (Winter 2000).

250. Miller, *supra* note 189 (citing Bantram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 858-59 (1999)).

251. *See* Ratification Status, *supra* note 34; Moralez, *supra* note 249, at 150-51.

252. ICC Statute, *supra* note 35, art. 13(c), 15.

253. U.S. Should Ratify, *supra* note 197, III(D).

prosecutor is essential to combat situations brought about by the ineffectiveness inherent with having only the two other trigger mechanisms.

Nevertheless, the power of the ICC prosecutor is very limited, and exercise of such is subject to strict scrutiny and procedural safeguards. Before the prosecutor can initiate an investigation on her own initiative, she must convince a panel of judges that the investigation has a "reasonable basis" and that the case is within the ICC's jurisdiction.[254] The prosecutor is also required to defer to investigations by national authorities, unless a panel of judges decides that those authorities are unwilling or unable to genuinely investigate or prosecute.[255] The prosecutor must also defer proceedings for a renewable twelve-month period at the request of the Security Council.[256] In addition, the prosecutor is limited to initiating investigations in cases that involve either conduct within the territory of states that have accepted the court's jurisdiction or acts committed by the nationals of such states.[257] Many of these safeguards were sponsored by the U.S. government and are included in the ICC Treaty due mostly to U.S. persistence.[258]

Unwarranted political attacks are also avoided because an absolute majority of the Assembly of States Parties is required to elect the prosecutor and one or more deputy prosecutors to nonrenewable nine-year terms.[259] Another safeguard is that the prosecutor and deputy prosecutors must be of different nationalities.[260] Despite the significant level of control maintained by the Security Council and the protections afforded it from political attack, the ICC is an independent body, unlike the ICTY, which is an organ dependent upon the Security Council.

According to the U.S. ambassador to the ICC, the United States entered into the ICC negotiations with the goal of creating "a court whose ability to act without a Security Council mandate would be shaped in such a way as to protect against a misguided exercise of authority that might harm national and international interests."[261] The goal of an independent and unbiased prosecutor has been

254. ICC Statute, *supra* note 35, art. 15(4).
255. *Id.* arts. 17 & 18.
256. *Id.* art. 16.
257. *Id.* art. 12.
258. U.S. Should Ratify, *supra* note 197, at III(D).
259. ICC Statute, *supra* note 35, art. 42(4).
260. *Id.* art 42(2).
261. U.S. Should Ratify, *supra* note 197.

achieved, but now the U.S. wants the ability to selectively immunize any of its citizens from prosecution. The U.S. indicates its desire for an independent prosecutor, but points to the dependent prosecutor of the ICTY as a model, resisting the possibility of an even mildly independent prosecutor.

Conclusion

During her closing statement concerning the adoption of the ICTY Statute, then-ambassador of the United States, Madeline Albright said, "of this we are certain: the Tribunal must succeed, for . . . the credibility of international law in this new era."[262] The U.S. government has the right general outlook, but envisions the wrong tribunal model to credibly secure a place for international criminal law in the twenty-first century.

As opposed to ICTY's creation, the ICC has the immeasurable advantages of being created by treaty, including greater international legal legitimacy. In addition, unlike the politically influenced ICTY, the ICC also has greater legitimacy, because it shows deference to national sovereignty and is a truly independent tribunal that can only be influenced by the Security Council enough to prevent political attacks.

The U.S. must reexamine its flawed foreign policy and realize that its criticisms of the ICC, given its support for the ICTY, are hypocritical. The goals the U.S. had hoped the ICTY would accomplish will be achieved more effectively and on a wider scale through the ICC. The U.S. must not let its judgment concerning foreign policy be overly influenced by its power. If the U.S. exercises its sovereign will and ratifies the ICC Treaty, it would be a momentous contribution to world order and, in the words of Justice Jackson at his opening address to the Nuremberg Tribunal, be "one of the most significant tributes that Power ever paid to Reason."[263]

262. U.N. SCOR, 48th Sess., 3217th mtg. at 17, U.N. Doc. S/PV. 3217 (1993).

263. Robert H. Jackson, Opening Address for the United States at the Nuremberg Tribunal, *Nazi Conspiracy and Aggression*, Vol. 1, Chapter 5, (Part 1 of 17 at 114 (1946)), *available at* http://www.nizkor.org/hweb/imt/nca/nca-01/nca-01-05-opening-address-usa.html (last visited Jan. 21, 2002).

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